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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

RESORT AIRLINES, INC., *Intervener.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
815 - 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for the Petitioner.

WHITEFORD, HART, CARMODY & WILSON,
815 - 15th Street, N. W.,
Washington 5, D. C.,

R. S. MAURER,
General Counsel,

L. E. BLACK, JR.,
Asst. General Counsel,

Chicago & Southern Air Lines, Inc.,
Municipal Airport,
Memphis, Tennessee,
Of Counsel.

———————, 1950.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Chicago and Southern Air Lines, the petitioner below, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 8, 1950, in so far as said order dismissed the petition for review and denied judicial review of the contentions advanced by petitioner in Points 4 and 5 of its petition for review (R. 47-49).[1]

[1] Petitioner accepts the order in so far as it denied judicial review of the other contentions advanced by petitioner in Points 1, 2, 3 and 6 of its petition for review.

OPINIONS BELOW.

The decision of the Civil Aeronautics Board which petitioner sought to review in the United States Court of Appeals for the District of Columbia Circuit is set forth at pages 36-43 of the record. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit dismissing the petition for review is set forth at pages 71-72 of the record and was not accompanied by any opinion.

JURISDICTION.

The per curiam order of the United States Court of Appeals for the District of Columbia Circuit was entered on May 8, 1950 (R. 72). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The pertinent statutory provisions are cited in Appendix A, *infra*, pages 23-24.

QUESTION PRESENTED.

This case presents a single question: whether the holding of this Court in the case of *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) that the issuance of a certificate of public convenience and necessity by the Civil Aeronautics Board in the field of foreign air transportation is immune from judicial review once Presidential approval thereto had been given, extends to a situation where in the issuance of such a certificate the Board and the President have transgressed the express provisions of the Civil Aeronautics Act and ignored the statutory scheme established by Congress in that Act.[2]

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[2] Hereinafter the Civil Aeronautics Act will be referred to as the "Act."

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SUMMARY STATEMENT OF MATTER INVOLVED.

The intervener, Resort Airlines, Inc., applied to the Civil Aeronautics Board for a certificate of public convenience and necessity authorizing it to engage in a limited and specialized form of air transportation generally described as sky cruises and designed to exploit vacation or pleasure travel through the medium of all-expense air tours. The application of Resort was consolidated for hearing with a similar application filed by American Air Export and Import Company (hereinafter referred to as AAXICO) and assigned for hearing before an Examiner of the Board on October 29, 1947. Various existing certificated air carriers, including petitioner, were permitted to intervene in opposition. Hearings were held and the Examiner's Report was issued on August 19, 1948, recommending the issuance of a certificate to Resort. (R. 11-12) After receiving briefs and hearing oral argument, the Board on January 31, 1949, adopted an opinion and order (R. 22-35), in which it found that the applications of Resort and AAXICO were not required by public convenience and necessity and should be denied in their entirety. Having concluded that public convenience and necessity did not require the air transportation proposed by Resort and AAXICO, the Board made no finding as to whether either Resort or AAXICO was fit, willing or able to render such transportation within the meaning of Section 401(d)(1) of the Act (52 Stat. 987, 49 U. S. C. 481).

Inasmuch as these applications included requests to engage in overseas and foreign air transportation, the Board on February 1, 1949, in accordance with Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601) submitted its decision to the President for approval. Thereafter, the President advised the Board that "for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas air transportation substantially in accord

with the recommendation of the Examiner." (R. 41) The record does not indicate on what possible basis the operation of all-expense air tours could be considered as "affecting our relations with foreign countries" or as being "in the interest of our national security." However, on June 1, 1949 the Board complied with the President's direction and issued an opinion and order granting Resort a temporary certificate of public convenience and necessity authorizing it to engage in foreign and overseas air transporfation limited to all-expense tours between certain points in the United States and certain points in foreign countries and United States possessions, including points already being served by petitioner (R. 42-43). The opinion and order of the Board contained no finding as to the "fitness, willingness and ability" of Resort as required by Section 401(d)(1) of the Act. This order was approved by the President on June 9, 1949. (R. 43)

On August 8, 1949, petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 1006(a) of the Act (52 Stat. 1024, 49 U. S. C. 646). (R. 45-61). Resort was permitted to intervene. (R. 61) In the petition for review, petitioner contended that the President had exceeded the authority delegated to him by Congress under Section 801 of the Act in two respects: (1) in specifying the particular carrier to render the air transportation which he considered to be in the national interest, and (2) in designating such carrier without the benefit of a finding by the Board as to the "fitness, willingness and ability" of that carrier to render such air transportation. Petitioner further contended that the Board has failed to comply with its statutory duty in not making any finding as to the "fitness, willingness and ability" of Resort before issuing the certificate to Resort as directed by the President (R. 47-49). On October 20, 1949 respondent, Civil Aeronautics Board, moved to dismiss the petition for review or, in the alternative, to affirm the Board's order forthwith (R. 61-63). Re-

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spondent urged in its motion to dismiss that the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) completely immunized from judicial review the contentions advanced by petitioner in its petition for review. On November 19, 1949, the intervener, Resort Airlines, also moved to dismiss the petition for review (R. 63-65).[3] On January 18, 1950, the United States Court of Appeals for the District of Columbia entered a per curiam order granting respondent's motion to dismiss and dismissing the petition for review (R. 65-66). The per curiam order was not accompanied by any opinion and assigned no reasons for the action taken. On January 26, 1950, petitioner filed a petition for rehearing and reconsideration or for clarification (R. 66-70). On May 8, 1950, the Court of Appeals denied the petition for rehearing and reconsideration but amended its order of January 18, 1950 to indicate that its action in granting respondent's motion to dismiss and in

[3] The intervener also moved to dismiss on the ground that although the petition for review had been filed within 60 days of the date of the President's approval of the Board's order, it had not been filed within 60 days after the "entry" of the order by the Board as required by Section 1006(a) of the Act, and for the further reason that petitioner had not urged before the Board its objections as to invalid exercise of power by the President and the Board as required by Section 1006(e) of the Act. The respondent joined in the latter objection. Neither of these objections was considered by the court below (R. 72). However, the respondent and intervener may seek to reassert these objections in answer to this petition. In the court below, petitioner answered these objections by showing: (1) that since the Board is prohibited under Section 801 from publishing its final order until Presidential approval has been obtained, the 60-day appeal period cannot begin to run until Presidential approval has attached; (2) that until the President and the Board had finally acted, petitioner could not have objected to their invalid exercise of power and failure to comply with the statutory scheme and that thereafter petitioner's only recourse was to seek judicial review; and (3) that in any event, in the unusual circumstances prevailing here, petitioner had "reasonable grounds" within the meaning of Sections 1006(a) and 1006(e) of the Act for failure to comply with the precise requirements of these sections.

dismissing the petition for review was based upon *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra.* (R. 72)

REASONS FOR GRANTING THE WRIT.

1. The order of the United States Court of Appeals for the District of Columbia Circuit in denying judicial review of alleged invalid exercise by the President of delegated Congressional power creates a fundamental conflict between the constitutional power of Congress over foreign commerce and the constitutional power of the President over foreign affairs, which conflict can only be resolved by the issuance of a writ of certiorari and a decision by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has misinterpreted the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra,* and has erroneously extended the immunity from judicial review granted by that decision to a situation not contemplated and, in fact, inferentially excepted in that case.

3. The order of the United States Court of Appeals for the District of Columbia Circuit granting the motion to dismiss renders unconstitutional the delegation of Congressional power to the President in the Civil Aeronautics Act and, to that extent, is in conflict with the recent decision of the United States District Court for the District of Columbia sitting as a statutory three-judge court in the case of *Colonial Airlines* v. *Adams, et al.,* 87 Fed. Supp. 242 (1949).

4. The order of the United States Court of Appeals for the District of Columbia Circuit dismissing the petition for review has decided questions of general importance and substance relating to the construction and application of the Civil Aeronautics Act not heretofore decided by this Court, such questions including:

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a. Whether the Board may ignore precise statutory requirements established by Congress and be immune from judicial review?

b. Whether the President in exercising delegated Congressional power may ignore the standards established by Congress and be immune from judicial review?

c. Whether the President may exercise power in excess of that delegated to him by Congress and be immune from judicial review?

ARGUMENT AND BRIEF.

1. The issuance of a writ of certiorari is necessary to resolve a fundamental conflict between the power of Congress over foreign commerce and the power of the President over foreign affairs.

The Civil Aeronautics Act of 1938 represents a comprehensive scheme for the regulation of air transportation and was enacted by Congress in the exercise of its constitutional power over foreign and domestic commerce. The Act provides that no one may engage in air transportation unless possessed of a certificate of public convenience and necessity issued by the Board, and further provides that the Board may not issue any such certificate unless it makes the requisite statutory findings of public convenience and necessity and of fitness, willingness and ability as set forth in Section 401 of the Act. Congress recognized the necessity of coordinating its power over foreign commerce with the President's constitutional power over foreign affairs. Accordingly, in Section 801 of the Act it delegated to the President a portion of its constitutional power and subjected to Presidential approval the issuance or denial of all certificates authorizing foreign air transportation. So much is clear from the Act itself. However, it does not follow from this that the Board and the President may ignore the statutory scheme established by Congress in matters affecting foreign air transportation. Nor

does it follow that judicial review is not available to determine whether in fact the Board and the President have ignored the statutory scheme. If judicial review is not available, then the President may resolve in his own favor any conflict between his power over foreign affairs and Congress' power over foreign air commerce, and the Board instead of being the creature of Congress to carry out its policy and purpose as set forth in the Act becomes the agency of the Executive. The issuance of the writ requested here is the first step leading to the ultimate determination of these important questions. Without the writ, the question of judicial reviewability is foreclosed. Without judicial review, the resolution of the conflict between Congressional and Presidential power is foreclosed.

2. The Court of Appeals for the District of Columbia Circuit has misinterpreted and misapplied the decision of the Supreme Court in the Waterman Case.

It is clear from the order dismissing the petition for review that the Court of Appeals for the District of Columbia Circuit was of the opinion that the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra,* completely immunizes from judicial review *any* action by the Civil Aeronautics Board and the President in the issuance of a certificate authorizing a carrier to engage in foreign air transportation. The *Waterman Case* was the only reason cited for dismissing the petition for review.[4] Since the factual situations in the *Waterman Case* and in the instant case are so different, it is imperative that a writ of certiorari issue so that this Court may declare that by its decision in the *Waterman*

[4] The order dismissing the petition for review states that the Court took judicial notice "that H.R. 5771, 80th Cong. 2d Sess., died in Committee." However, the order does not indicate what effect this had upon the court's reasoning, if any. In any event, the fact that a particular piece of legislation was introduced or failed of passage or "died in Committee" is of no legal significance here.

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Case it did not intend to immunize from judicial review *any and all action* by the Board and the President in the issuance of a certificate covering foreign air transportation, particularly where the Board and the President have violated the express provisions of the Act or exceeded the power conferred upon them by Congress.

The *Waterman Case* was decided by this Court in 1948 by the narrow margin of a five to four decision. In that case the Civil Aeronautics Board had rendered a decision in which it found: (a) that public convenience and necessity required the certification of a carrier to engage in foreign air transportation in the Caribbean area, and (b) that Chicago and Southern Air Lines was fit, willing and able to engage in such transportation, both of which findings are statutory findings required by Section 401 of the Act. This decision was submitted to the President for approval in accordance with Section 801 of the Act and his approval was obtained. Waterman Airlines, a rival applicant for the routes, petitioned for judicial review and this Court held, when the matter was finally presented to it, that the valid exercise of the President's discretionary power under Section 801 of the Act was immune from judicial review. In that case no question was raised by Waterman as to any failure by the Board to make the requisite statutory findings, nor was any question raised as to the legality of the action of the President in approving the Board's decision. Even so, this Court divided five to four on the question of judicial reviewability.

The instant case presents a different situation. Here the Board and the President exceeded the authority vested in them by Congress under the Act. Here the Board acted illegally in issuing a certificate to Resort without having first made a determination as required by Section 401 of the Act as to the fitness, willingness and ability of Resort to engage in air transportation. Here the President exceeded the power delegated to him by Congress in Section 801 of the Act in specifically directing the Board to issue

a certificate to Resort (instead of leaving it to the Board to determine whether Resort or AAXICO should be certificated to provide the air transportation deemed by the President to be in the national interest) and in directing the Board to issue a certificate to Resort without the benefit of a recommendation from the Board as to the fitness, willingness and ability of Resort to engage in such air transportation. This presents an entirely different situation from that presented in the *Waterman Case.*[5]

The difference between the two cases was apparently anticipated by the majority opinion of this Court in the *Waterman Case.* In one of the opening sentences of his majority opinion in the *Waterman Case,* Mr. Justice Jackson stated as follows:

> "*By proceedings not challenged as to regularity,* the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago & Southern Air Lines, a rival applicant." 333 U. S. 105. (Italics supplied)

This language infers that the majority opinion expressly reserved for a future time the question whether irregularities committed by the Board or the President in the is-

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[5] Petitioner is particularly well aware of these differences inasmuch as petitioner was an active participant in the *Waterman Case.* It was petitioner which carried the *Waterman Case* to this Court and successfully urged upon this Court that the issuance of a certificate of public convenience and necessity in foreign air transportation is immune from judicial review in a situation where the Board complied with the statutory scheme established by Congress in the Act, and where the recommendations made by the Board to the President were approved by him in the valid exercise of his powers under Section 801 of the Act. Petitioner is not now seeking to avoid in this proceeding the rule of law resulting from its successful prosecution of the *Waterman Case.* Petitioner believes that the rule of law established in the *Waterman Case* is the correct one under the factual situation, issues and contentions there involved. The instant proceeding, however, involves a different factual situation and presents different issues.

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suance of a certificate involving foreign air transportation are subject to judicial review. In his dissenting opinion, Mr. Justice Douglas (joined in by Mr. Justice Black, Mr. Justice Reed and Mr. Justice Rutledge) stated as follows:

> "Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. *Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.*" 333 U. S. 117 (Italics supplied)

The dissenting Justices undoubtedly anticipated a future case where legal irregularity might be involved and feared that even in such a case judicial review would be denied under the rationale of the majority opinion. It seems reasonable to assume, therefore, that the phrase "by proceedings not challenged as to regularity" was inserted by Mr. Justice Jackson in the majority opinion to lay at rest the misgivings of the four dissenting Justices and to make it perfectly clear that the law of the *Waterman Case* was not as broad in scope as the dissenters feared and that the majority expressly reserved for future decision in an appropriate case the question whether immunity from judicial review attached to invalid exercise of power by the Board and by the President. It is such a case that petitioner now presents.

Since the decision in the *Waterman Case*, there has been considerable debate as to the full scope, meaning and effect of that decision.[6] Does the *Waterman Case* mean that the

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[6] The importance of the decision of the Supreme Court in the *Waterman Case* and the serious questions posed by the decision as to the scope of immunity from judicial review provided therein is evidenced by the large number of legal articles which have been written commenting on this decision and its possible scope, including the following: 61 Harvard Law Review 1053 (1948); 43 Illinois Law Review 693 (1948); 32 Minnesota Law Review 811 (1948); 17 Journal Bar Ass'n., Kansas 241 (1948); 15 Journal of Air Law, Northwestern 474 (1948); 47 Columbia Law Review 1081 (1947).

Board and the President have an absolutely free hand in the award of certificates involving foreign air transportation? Can they ignore the mandatory requirements of the Act as established by Congress? Are there any limits on their immunity from judicial review and, if so, what are these limits? Did this Court in the *Waterman Case* intend that the constitutional power of Congress over foreign commerce should be completely subservient to the President's power over foreign affairs? Did this Court mean that the President in exercising his delegated power over foreign commerce under Section 801 of the Act could ignore the standards prescribed by Congress in Section 401? At present neither the President, the Board nor the air transport industry has any clear understanding on these vital questions. All that can be said with certainty under the *Waterman Case* is that a decision of the Civil Aeronautics Board arrived at after notice and hearing and in full compliance with procedural due process and supported by the necessary statutory findings of (a) public convenience and necessity, and (b) of fitness, willingness and ability, awarding a certificate in foreign air transportation is not subject to judicial review once the decision of the Board has been approved by the President in the valid exercise of his delegated and discretionary power under Section 801. The instant case is the first to come before this Court since the *Waterman Case* which presents a situation where the Board did *not* make the necessary statutory findings and where the President *invalidly* exercised the powers conferred on him by Section 801, and exercised powers in *excess* of those conferred by Section 801.[7]

[7] As will be shown below, the Government has, until this case arose, consistently construed the *Waterman Case* as not precluding judicial review of failure to comply with statutory requirements of law and procedure.

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3. The action of the Court of Appeals for the District of Columbia Circuit denying judicial review compels the conclusion that the delegation of Congressional power to the President in the Civil Aeronautics Act is unconstitutional. As such, the action of the Court is inconsistent with a decision by a three-judge statutory court in the same Circuit.

A further reason for granting the writ of certiorari is provided by the conflict between the order of the court below and the recent decision of the United States District Court for the District of Columbia sitting as a statutory three-judge court in the case of *Colonial Airlines* v. *Adams, et al.*, 87 Fed. Supp. 242 (1949). In the latter case, which involved the constitutionality of Sections 402 and 801 of the Act, the exact meaning and effect of this Court's holding in the *Waterman Case* became important. The constitutional question turned on whether the delegation to the President in Section 801 of the Act of a portion of Congress' power over foreign commerce had been accompanied by adequate standards in Section 402 of the Act.[8] In sustaining the constitutionality of the disputed sections, the majority opinion in the *Colonial Case* held that the standards provided by Section 402, including the standard of "fitness, willingness and ability," were mandatory and not merely permissive, otherwise the delegation by Congress to the President in Section 801 would be unconstitutional. The dissenting opinion, however, interpreted the *Waterman Case* as holding that the President is not bound by the standards imposed by Congress in Section 402, since he may disregard them without fear of judicial review. From this it concluded that Section 402 did not provide suitable standards and was, therefore, unconstitutional.

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[8] Section 402 of the Act relates to the issuance of permits to foreign air carriers and is substantially the same as Section 401 relating to the issuance of certificates to domestic air carriers. Both sections require the Board to find that the carrier seeking the permit or certificate is "fit, willing and able" to engage in the air transportation applied for.

The conflict between the action of the Court of Appeals in the instant case and the decision in the *Colonial Case* is clear. In the instant case the Court of Appeals has extended the *Waterman Case* to hold that judicial review may not be had where the standard of "fitness, willingness and ability" has not been complied with. In the *Colonial Case* the opposite assumption forms the basis of the majority opinion, which holds that compliance with the "fitness, willingness and ability" standard established by Congress is mandatory and that the finding of "fitness, willingness and ability" must be had *before* the President acts. If the Court of Appeals in the instant case is correct, then it follows that the Court in the *Colonial Case* was wrong in basing its finding as to the constitutional issues presented on the mandatory nature of the standards established by Congress.

The intra-circuit conflict resulting from the decision of the Court of Appeals in the instant case and the decision of the statutory three-judge court in the *Colonial Case*[9] can only be resolved by a writ of certiorari by this Court.

4. In the Waterman Case the Solicitor General conceded that judicial review might be had under circumstances analogous to those presented here.

In his Brief to this Court in the *Waterman Case*, the Solicitor General of the United States did not urge that blanket immunity from judicial review extended to all cases involving Presidential approval of certificates in foreign air transportation. He, as well as petitioner, merely contended that immunity from judicial review extended to the valid exercise of the President's discretionary power and this Court so held. The Solicitor General in the *Waterman Case* conceded that an appropriate case might arise where

[9] The *Colonial Case* having been decided by a statutory three-judge court was not subject to review by the Court of Appeals. It was appealed to the Supreme Court but the appeal was ultimately withdrawn. 94 L. Ed. 374 (1950).

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judicial review might be had and cited examples startlingly similar to the situation here presented:

> "While the exercise of the President's discretionary power is not subject to judicial review, there remains the question whether any other elements of the joint President-Board action are properly reviewable by the courts.
>
> "In Section 401 of the Civil Aeronautics Act, Congress has imposed various conditions precedent to the issuance of certificates of public convenience and necessity. Public notice of the filing of an application for such a certificate must be given by the Board, and the application may be determined only after a public hearing. Section 401 (c). Also, Section 401 (f) contains affirmative and negative requirements as to the terms and conditions to be contained in any certificate, which may be issued under that section. It requires, *inter alia*, that American carrier certificates for foreign air transportation must permit the handling of foreign mail. Again the certificates may not restrict the right of the carrier 'to add to or change schedules'. If Section 1006(a) is construed as evidencing a Congressional purpose to provide for review, so far as practicable, of joint President-Board orders relating to certificates for overseas or foreign air transportation, then these are matters which are capable of judicial scrutiny to ascertain whether there has been compliance with the statutory requirements.
>
> "To summarize our views: the President's discretionary powers under Section 801 are not reviewable. Questions as to the adequacy of evidence to support the Board's findings and conclusions do not present reviewable issues. The Board's compliance with such statutory requirements as notice and hearing may be reviewable, together with outright questions of law such as would be involved in the Board's failure to comply with the requirements of Section 401 (f)."
> Government's Brief in *Waterman Case*, pp. 52-53.

The foregoing position has been consistently followed by the Government in every case since the *Waterman Case* until the present one.[10]

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[10] For example, in *Seaboard & Western Airlines, Inc.* v. *C.A.B.*, 181 Fed. (2d) 777 (1949), the Government's Brief to the Court of Appeals for the District of Columbia Circuit construed the decision of this Court in the *Waterman Case*, as follows (p. 15):

> "In the *Waterman* case the Supreme Court held that 'orders of the Board as to certificate for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review at any time before they are finalized by Presidential approval' and that 'after such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate' (333 U.S. at p. 114). It seems clear, however, that the Court was not passing upon the question whether the Board's compliance with legal and procedural requirements of the statute were subject to review. It put these questions aside at the outset by stating that the orders of the Board arose 'by proceedings not challenged as to regularity' (333 U.S. at p. 105).
>
> "Seaboard argues that this language was purely descriptive and has no particular significance. It points to the language of the dissenting opinion which, recognizing that no question of procedural irregularity was before the Court, states that 'tomorrow' such questions may arise and the Board's action will not be subject to correction by the Courts (333 U.S. at p. 118) (Reply to Respondent's Objections to Petition for Stay of Proceedings, filed April 14, 1949, pp. 13-15). It is possible to construe the Court's decision in the *Waterman* case either as refusing to pass upon an issue that was not before it, or as intimating that procedural irregularities in orders approved by the President could not be judicially reviewed. We think that the position of the Board before the Court in the *Waterman* case requires the adoption of the former construction.
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> • • • • • •
>
> "Since the Board did not contend that approval of one of its orders by the President insulated such order from review for procedural or legal irregularities, and since the orders before the Court arose 'by proceedings not challenged as to regularity,' as the Court stated, we submit that the *Waterman* case does not purport to determine whether an order of the Board approved by the President may be reviewed in the courts for procedural irregularities. While the *Waterman*

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The striking similarity between the argument advanced by the Government in the *Waterman* and *Seaboard Cases* and the argument advanced by petitioner in the instant case is readily apparent. Petitioner here urges nothing more or different than was urged by the Government in the *Waterman Case* as noted above. If the Government is consistent, it will be supporting and not opposing the issuance of the writ requested herein. As recently as July 13, 1950, the Government conceded that an illegal order issued by the Civil Aeronautics Board was subject to review by the courts even though such illegal order had been approved by the President under Section 801:

> "If the Board's original decision could not lawfully be submitted to the President under 49 U.S.C. 601, and, as plaintiffs contend, any subsequent order of the Board would necessarily be illegal, then any such subsequent order would also be outside the exceptions to the judicial review provisions of the Act (49 U.S.C. 646) as interpreted by the *Waterman* case."
>
> Government's Supplemental Memorandum in support of motion to dissolve temporary restraining order, *Seaboard & Western Airlines, Inc., et al.* v. *Oswald Ryan, et al., Members of the Civil Aeronautics Board,* Civil Action 2989-50, U. S. District Court, D. C.

The inclusion by Mr. Justice Jackson in his majority opinion in the *Waterman Case* of the phrase "by proceed-

---

case does not preclude such review,[10] the cases under the Tariff Acts referred to above would seem to permit it.[11] * * *"

"[10] The situation appears to be that the four dissenting justices in the *Waterman* case would permit such review, and that the five justices representing the majority have not expressed themselves on the question."

"[11] See also, for example, *Perkins* v. *Elg*, 307 U.S. 325, 350 (1939), where the Supreme Court reversed the Secretary of Labor's determination of a legal question as to the citizenship of an applicant for a passport, although it professed to have no power to interfere with the 'discretion' of the Secretary of State to grant or withhold the passport."

ings not challenged as to regularity" undoubtedly indicated his acceptance of the Government's contention that judicial review might be had in a case where legal or procedural irregularities were involved, notwithstanding Presidential approval. Petitioner sought to present such a case in the court below but found itself confronted with the Government no longer maintaining the position it advanced in the *Waterman Case* and instead contending that the procedural and legal irregularities alleged by petitioner are immune from judicial review, citing the *Waterman Case* as authority for this proposition. A writ of certiorari should issue to provide this Court an opportunity to pass upon an important case of first impression, one "challenged as to regularity."

CONCLUSION.

The issues which petitioner has raised in its petition for review are of far-reaching importance. They require judicial definition of the scope of the President's authority under Section 801 of the Civil Aeronautics Act. They require judicial delineation of the constitutional power of Congress over foreign commerce as expressed in the Civil Aeronautics Act and of the President's constitutional power over foreign affairs. They require judicial determination of the extent which the President in purportedly exercising his constitutional power over foreign affairs can usurp, override or disregard the power delegated to the Civil Aeronautics Board by Congress to determine what carriers are fit, willing and able to engage in air transportation. They raise questions as to the constitutionality of Sections 401 and 801 of the Act if the failure by the President and the Board to comply with Congressional standards is not judicially reviewable. The court below has held that the decision of this Court in the *Waterman Case* precludes a determination of any of these issues by the judiciary. The District Court in the same circuit in a decision not subject to review by the court below has held to the contrary.

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The importance of air transportation to foreign and domestic commerce, to the national defense and to the Postal Service has been recognized by Congress in Section 2 of the Civil Aeronautics Act. As this Court stated in the *Waterman Case* (333 U. S. 108) air transportation has "burst suddenly upon modern governments offering new advantages, demanding new rights and carrying new threats." For that reason, it is essential that the respective powers of Congress and the President in the development of foreign air transportation be clearly delineated and that the scope of the President's power in approving or disapproving recommended decisions by the Civil Aeronautics Board be clearly defined.

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Court of Appeals for the District of Columbia Circuit and upon such review the order of said Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
Attorneys for the Petitioner.

NOTE: Addendum beginning on page 20.

ADDENDUM.

Since the printing of the foregoing portion of this petition, certain matters have arisen which emphasize the importance of this case and the need for a clear definition by this Court of the scope of its decision in the *Waterman Case* and the extent to which judicial review is available to correct invalid exercise of Presidential and Board power. On July 20, 1950, petitions for review and for stay were filed in the United States Court of Appeals for the Second Circuit in two separate actions challenging the legality of various orders issued by the Civil Aeronautics Board and approved by the President in the widely discussed Pan American-American Overseas Merger Case; *Trans-World Airlines* v. *The Civil Aeronautics Board, et al., Civil Action No.* ——— and *Brian O. Sparks, et al* (*employees of American Overseas Airlines*) v. *The Civil Aeronautics Board,* Civil Action No. 21728. In each of these cases the petitioners allege that the orders issued by the Board and approved by the President related to a subject matter which was not subject to Presidential approval under Section 801 of the Act and that the Board should not have submitted to Presidential direction and control in the issuance of such orders. Notwithstanding the fact that counsel for the Government on repeated occasions has taken the position in various courts that the *Waterman Case* would not preclude judicial review of alleged legal or procedural irregularities (*supra,* pp. 15-17), in the objections filed by the Government on July 26, 1950, in the Second Circuit in opposition to the petitions for stay, the Government now contends that the *Waterman Case* precludes judicial review once Presidential approval has attached, even in the case where Presidential review and approval is not authorized by the Act, and to support this contention cites the order of the court below in the instant case:

> "The Petition for a stay and other interlocutory relief should be denied because the order of the Board

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(Serial No. E-4410), the effectiveness of which Petitioner seeks to stay, is not within the jurisdiction of this Court to review. The order was entered by the Board at the direction of the President, pursuant to section 801 of the Civil Aeronautics Act, as amended, (49 USC 601). The Supreme Court held in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corporation*, 333 U. S. 103, that orders entered at the direction of the President in this fashion 'embodied Presidential discretion as to political matters beyond the competence of the courts to adjudicate.' (333 U. S. at p. 114.)"

* * * * *

"Only recently, on facts not unlike those at bar, this procedure received the express sanction of the Court of Appeals for the District of Columbia Circuit. *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, App. D. C. No. 10375, petition for review dismissed May 8, 1950. In that case the Board submitted an opinion and order to the President recommending denial of two applications to engage in foreign air transportation. The President advised the Board that he believed such air transportation to be required in the interests of the United States and directed the Board to certificate one of the two applicants. The Board complied with this directive. A competitor of the newly certificated carrier challenged the President's action as being beyond the scope of his authority under section 801 of the Act, and contended that the President should have required the Board to submit a recommendation with respect to the carrier to be authorized to perform the services the President thought desirable. The Court of Appeals granted the Board's motion to dismiss the petition for review 'on the authority of *Chicago and Southern Air Lines* v. *Waterman Steamship Co.*, 333 U. S. 103'. It is perfectly clear therefore that the *Waterman* case requires the conclusion that the President has authority, once a case is submitted to him, to direct the Board to take such action with respect to an application as he deems appropriate." (Objections to Petitioner's Motion for Stay, pp. 6, 10-11).

Thus we find that whereas the Government as recently as July 13, 1950, conceded in argument before the District Court for the District of Columbia that an order of the Board issued illegally could be reviewed judicially notwithstanding the *Waterman Case* (*supra*, p. 17), less than two weeks later and on July 26, 1950, in proceedings before the Court of Appeals for the Second Circuit involving the same parties and the same subject-matter, the Government took just the opposite position.

If for no other reason, this Court should issue the writ of certiorari in order to resolve all further doubt as to the scope of its decision in the *Waterman Case*. Legal or procedural irregularities committed by the President or the Board in proceedings involving foreign air transportation are either reviewable by the courts or they are not. No persuasive resolution of the question can be expected short of a final decision by the Supreme Court. Issuance of the writ requested herein will provide that opportunity.

It cannot be predicted at this time what disposition the Court of Appeals for the Second Circuit will make of the cases pending there or whether its action will be in conflict with the order of the Court of Appeals for the District of Columbia Circuit granting the motion to dismiss in the instant case. However, the very existence of these cases in the Second Circuit and the broad and sweeping claims of immunity from judicial review now being made by the Government in reliance upon the *Waterman Case* demonstrate the great public importance of the basic jurisdictional question presented here. The determination of this question is of importance not only to petitioner but also to other important units in the air transport industry subject to governmental regulation.

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APPENDIX A.

Statutes Involved.

1. Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481):

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation."

* * * * *

"(d)(1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

2. Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601):

"The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. * * *"

3. Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646):

"(a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act,

shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said 60 days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

* * * * *

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: PROVIDED, That no interlocutory relief may be granted except upon at least five days' notice to the Authority."

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

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IN THE

Supreme Court of the United States

October Term, 1950

No. 235

CHICAGO AND SOUTHERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
RESORT AIRLINES, INC., *Intervener.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner and presents this reply to the briefs in opposition to the petition for a writ of certiorari filed in this case.

JURISDICTION.

The petition for a writ of certiorari was filed on August 4, 1950 and briefs in opposition were filed, one on and one

before, September 6, 1950. This reply is filed in timely manner, in accordance with Rule 38 of this Court.

STATEMENT.

Intervener in the court below (R. 63) and in its brief in opposition (p. 11) contends that judicial review of the petition for review is precluded bythe fact that the petition was not filed within sixty days of the entry of the Board's order as required by Section 1006 (a) of the Civil Aeronautics Act [49 USC 646 (a)]. Both respondent and intervener in the court below (R. 62 & 63) and in their briefs in opposition contend that judicial review is precluded by the fact that petitioner did not raise the questions and objections raised in its petition for review before the Civil Aeronautics Board. The lower court did not rule on either of these contentions, but dismissed the petition for review on other grounds (R. 72). Because the respondent and the intervener have renewed these contentions in their briefs in opposition to the petition for a writ of certiorari, petitioner herewith summarizes the arguments presented by it on these questions in the court below. The detailed arguments presented to the court below is contained in the record before this Court (fol. 673-680, 700-707) but is not in the printed transcript.

ARGUMENT.

1. The Petition for Review Was Filed Within Sixty Days After the Entry of the Order of the Civil Aeronautics Board as Required by Section 1006 (a) of the Civil Aeronautics Act.

Intervener in its brief in opposition (p. 11) contends that judicial review is precluded because the petition for review, which was filed August 8, 1949, sixty days after the President approved the Board's order on June 9, 1949, was not filed "within sixty days after the entry of such order" as required by Section 1006 (a) of the Civil Aeronautics Act.

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The Board's decision was made on June 1, 1949 "subject to the approval of the President" (fol. 721). The order of June 1, 1949 (R. 42) was approved by the President on June 9, 1949 (R. 43). Section 801 of the Civil Aeronautics Act (Pet. 23) prohibits publication of such an order until it has been approved by the President. No rights or duties flowed from the Board's order on June 1, 1949 because it required Presidential approval to become effective. Prior to that time it was only a "recommendation."[1]

The Intervener contends (p. 11) that although the period within which to file was reduced by eight days because the President did not approve until June 9, 1949, more than sufficient time still remained in which to file the petition for review. To place such a strained construction upon the meaning of Section 1006 (a) of the Act not only ignores the obvious meaning of the section when read in the light of Section 801, but also introduces an unintended element of uncertainty and destroys the petitioning party's statutory right of review. A very cursory survey of cases before the Board reveals that the Intervener's interpretation would have the effect of changing the period within which to file from the 60 days prescribed by the statute to a period varying from 59 days to 2 days depending upon the unknown contingencies of the case.[2] In many instances Presidential approval has not attached until more than 60 days after the Board has adopted the order subject to the approval of

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[1] *Chicago & Southern Air Lines, Inc.*, v. *Waterman Steamship Co.*, 133 U. S. 103, 109 (1948).

[2] *Pacific Northwest-Hawaii Case*, 9 C. A. B. 580, decided October 1, 1948, approved October 2, 1948, elapsed time: 1 day.

Hawaiian Airlines Ltd.,—Certificate Amendment, 10 C. A. B. 100 decided February 21, 1949, approved March 22, 1949, elapsed time: 29 days.

Boston-Bermuda Case, 9 C. A. B. 563, decided September 2, 1948, approved October 21, 1948, elapsed time: 49 days.

Caribbean Area Case, 9 C. A. B. 534, decided July 20, 1948, approved September 15, 1948, elapsed time: 58 days.

the President.[3] Nor is it a solution to suggest, as the Intervener has done (p. 12), that in cases of substantial delay the Petitioner may ask leave of court to file the petition for review under the last sentence of Section 1006 (a). Such a construction would deny the absolute right to review conferred by Section 1006 (a) and would substitute in its place a permissive right subject to the discretion of the court.

The only reasonable interpretation of Section 1006 (a) of the Act must be that "entry of the order" means the effective date of the order. In cases which must be presented to the President for his approval in conformity with Section 801, that section expressly prohibits even the publication of the order until Presidential approval has attached. Petitioner did not and could not have known of the Board's order of June 1, 1949, until after the President approved the order on June 9, 1949. The latter date must be held to be the one from which the sixty day period starts to run. To hold otherwise would mean that when the President approved the order it became an order as of a prior date, that is, on June 9 the order became an order as of June 1, a *nunc pro tunc* order. Such a holding would reverse the early holding of this Court, never departed from, that the date of the final order appealed from is the determinative date and that the date can not relate back to a prior date to shorten the appeal period authorized.[4]

The Circuit Court of Appeals for the District of Columbia Circuit, in construing "entry of such order" in Section 1006 (a) of the Act, has held that the filing of a petition for reconsideration has the effect of tolling the sixty day period and that the period does not start to run until the date on which the Board denies the petition for reconsidera-

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[3] *Pacific Northwest-Hawaii Service Case* 9 C. A. B. 414, decided March 16, 1948, approved July 29, 1948, elapsed time: 135 days.
Hawaiian Intraterritorial Service, 10 C. A. B. 62, decided November 29, 1948, approved February 17, 1949, elapsed time: 79 days.

[4] *Providence Rubber Co.* v. *Charles Goodyear, Executor*, 6 Wall 153, 18 L. Ed. 762.

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tion.[5] If the filing of a petition for reconsideration has the legal effect of tolling the 60 day appeal period, then *a fortiori* the time required to obtain Presidential approval of the Board's recommended order tolls the appeal period. In the former case, the aggrieved party had complete knowledge of the order adopted by the Board adversely affecting it. The order was entered, was final, and was legally binding. No information of any kind necessary to take an appeal was needed, and yet the Court construed the language of Section 1006 (a) in such a way as to delay starting the 60 day period to a time after the original entry of the order complained of. In the instant case, the order of June 1, 1949 was not final. It was specifically made subject to approval by the President. It was not made known to Petitioner or to the public generally, except after Presidential approval had been obtained. It was withheld from public disclosure.

Even if the court should agree with the Intervener's technical interpretation of the 60 day provision in Section 1006 (a), it is clear that Petitioner falls within the exception of Section 1006 (a), and that Petitioner had reasonable grounds for failure to file its petition on July 31, 1949 instead of on August 8, 1949. The particular question presented by the Intervener's "timeliness" argument has never been decided by any court and Petitioner submits that, under such circumstances, it had reasonable grounds for assuming the 60 day period began to run after Presidential approval had been obtained and when the Board for the first time published its order and thereby advised Petitioner for the first time that it was aggrieved.[6]

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[5] *Braniff Airways, Inc.*, v. *Civil Aeronautics Board*, 147 F. (2d) 152 (1945).

[6] Petitioner did not and does not admit that Intervener's contention that the 60 day period started to run from June 1, 1949 has any merit. However, in order to resolve any possible question, Petitioner in its answer to Intervener's motion to dismiss in the court below requested special leave of court, pursuant to Section 1006 (a), to the extent that such special leave was deemed necessary.

2. The Fact That Petitioner Did Not Raise Before the Civil Aeronautics Board the Objections Raised in Its Petition for Review Does Not Preclude Judicial Review.

Section 1006(e) of the Act provides that:

> "No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board], or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Respondent and intervener contend that under the foregoing language petitioner was required to file a petition for reconsideration and raise its objections before the Board before applying for judicial review.

It is a sufficient answer to this contention to cite Section 10(c) of the Administrative Procedure Act and the case of *Levers* v. *Anderson*, 326 U. S. 219 (1945). The *Levers Case* was decided before the enactment of the Administrative Procedure Act but follows the rule first laid down in *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43 (1923), and *United States* v. *The Abilene & Southern Ry. Co.*, 275 U. S. 274 (1924). From the decision of the Supreme Court in the *Levers Case*, it is clear that judicial review will not be denied merely because the petitioner did not seek a rehearing before the administrative agency, especially where the right to rehearing before the agency is permissive and not mandatory. In the *Levers Case* the Court relied in large measure upon the permissive language of the regulation involved, which permitted rehearing, and the fact that judicial review was provided in the Federal Alcohol Administration Act itself. The same points can be made with respect to the present case. Section 1006(a) of the Civil Aeronautics Act provides an absolute right to judicial review of the orders of the Board by the Circuit Courts of Appeals. The Rules of Practice of the Board provide that an application for reconsideration of any final order of the Board *may* be filed with the Board (14 C.F.R., Sec. 285.11).

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In both the *Levers Case* and in the instant case the right to judicial review was given by the statute. Similarly, in both cases the right to reconsideration was a permissive right granted by the agency. In both cases a final order of the agency was involved with no further action by the agency contemplated.

Section 10(c) of the Administrative Procedure Act provides in part as follows:

> "Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

This section of the Administrative Procedure Act codifies the rule of the *Levers Case.*

The cases cited by respondent and intervener are distinguishable from both the present case and the *Levers Case.* In all those cases some further development, some further hearing, or some further action growing out of the order complained of had been contemplated by the administrative agency involved at the time the aggrieved party sought to take his appeal to the courts. No such action is involved here. The Board's order of June 9, 1949 was final and no further action by the Board or by the President was contemplated.

Section 1006(e) is not an unusual provision. It merely incorporates into the Civil Aeronautics Act a well recognized general rule that an appellate court will not undertake to review matters which were not raised below. However, this rule has no applicability to the type of objections made by petitioner and which could not have been raised at any time during the proceedings before the Board. As this case was proceeding through the various procedural steps before the Board prior to decision, petitioner had the

right to assume that when Presidential approval to the Board's decision was finally obtained under Section 801 of the Act, the President would act within the scope of the authority vested in him by Section 801 and would not exceed it as alleged. Accordingly, there was no opportunity for petitioner to raise its objections until after the Board's Order, approved by the President, had been issued. Petitioner had no way of knowing at the time this proceeding was pending before the Board that the President would exceed the authority vested in him by Section 801. The issues raised by petitioner were nonexistent at that time. They became issues only after the Board issued its final order of June 9th, in which it issued a certificate to Resort pursuant to Presidential direction. In the recent case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947), where a similar contention was advanced under a similar statutory provision limiting review, the Supreme Court said:

> "But the provision of section 10(e), that 'No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. * * * [The issue raised on review] was thus a matter which could not have been raised before the Board. And the failure of respondent to raise the then nonexistent issue before the Board could not deprive the court below of the power to consider the issue once it did come into existence." pp. 427-428.

In any event, whether Section 1006(e) is held to cover the type of objections raised by petitioner or not, it should be recognized that Section 1006(e) specifically contemplates that there may be situations where matters might not be raised before the Board but which might be raised on judicial review. Section 1006(e) has a specific exception to

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cover a case where there might be reasonable grounds for failure to raise objections before the Board before applying for judicial review. Assuming arguendo that petitioner's objections are the type of objections contemplated by Section 1006(e), then petitioner urges that the unusual nature of these objections which raise questions as to the scope of Presidential power under Section 801 and the fact that it was the President who directed the Board to issue the certificate to Resort in spite of the Board's findings adverse to Resort, provide reasonable grounds for petitioner's failure to raise these objections with the Board before applying for judicial review.

Respectfully submitted,

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
815 15th Street, N. W.,
Washington 5, D. C.
Attorneys for Petitioner.

WHITEFORD, HART, CARMODY & WILSON,
815 15th Street, N. W.,
Washington 5, D. C.

R. S. MAURER,
General Counsel.

L. E. BLACK, JR.,
Asst. General Counsel,
Chicago & Southern Air Lines, Inc.,
Municipal Airport,
Memphis, Tennessee,
Of Counsel.

September 13, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIRLINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD and RESORT AIRLINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of United States Court of Appeals for the District of Columbia (R. 71-72) and the opinions and orders of the Civil Aeronautics Board (R. 22-35, 36-43) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1950 (R. 71). The petition for a writ of certiorari was filed on August 4, 1950. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Application was made to the Civil Aeronautics Board by two carriers for certificates of convenience and necessity to conduct overseas air tours. Pursuant to Section 801 of the Civil Aeronautics Act, the Civil Aeronautics Board submitted to the President a decision denying both applications. The President directed that one of the applicants be granted a certificate and the Board adopted an order complying with this directive, which the President approved. The questions presented are:

1. Whether petitioner is barred from attacking the President's action as exceeding statutory authority or as being unconstitutional because petitioner failed to raise these issues before the Civil Aeronautics Board.

2. Whether the action taken in this case failed to comply with the Civil Aeronautics Act by reason of the fact that the President designated the carrier to be certificated or by reason of the fact that the Board did not make a finding as to the fitness of the carrier certificated.

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3. Whether, under the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, the President's decision in this case is judicially reviewable.

4. Whether the statute as here applied is constitutional.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, are set forth in the Appendix, *infra*, pp. 15-16.

STATEMENT

Resort Airlines, Inc. and American Air Export and Import Company filed applications before the Civil Aeronautics Board pursuant to Section 401 of the Civil Aeronautics Act for authority to engage in aerial all-expense tours and the applications were heard upon a common record. Petitioner and thirteen other certificated air carriers were granted leave to intervene in this proceeding and actively participated therein. After hearings before an Examiner, he issued a report recommending that the Board grant to Resort certain certificates of public convenience and necessity (R. 11). In such report the Examiner found that Resort is "fit, willing, and able properly to perform the air transportation service recommended" (R. 12). Subsequently the Board adopted but did not publish an opinion and proposed order finding that public convenience and necessity did not re-

quire the air transportation proposed, and that both applications should be denied (R. 22-34). In view of this proposed disposition of the applications it was unnecessary for the Board to pass upon the fitness and ability of the respective applicants, and no findings thereon were made.

Pursuant to the provisions of Section 801 of the Act (*infra*, pp. 15-16), the Board submitted its opinion containing its findings, conclusions and decision to the President for approval (R. 42). The President subsequently advised the Board that for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas transportation substantially in accord with the recommendation of the Examiner (R. 41). Pursuant to this Presidential directive, the Board on June 1, 1949, adopted an opinion, subsequently approved by the President on June 9, 1949, setting forth the President's action, and issued an order granting a temporary certificate of public convenience and necessity to Resort authorizing the tours (R. 36, 42, 43). The certificate provided that it was to become effective within 60 days after the date of its approval by the President unless prior thereto the Board extended such effective date on its own initiative or upon the filing of a petition for reconsideration of its order (R. 45). Petitioner did not file a petition for re-

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consideration although such petitions were filed by several other party intervenors. The Board denied these petitions on August 4, 1949, and the certificate issued to Resort became effective on August 8, 1949, sixty days after the President's approval thereof (R. 59-61).

Petitioner on August 8, 1949, filed a petition for review based upon Section 1006 of the Act (49 U. S. C. 646) seeking review of the Board's order of June 1, 1949 (R. 45). Respondent moved to dismiss the petition for review upon the ground that the Board's order is not subject to judicial review on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, or in the alternative to dismiss the petition for want of jurisdiction as to four of the grounds upon which it attacked the order and to affirm the order forthwith as to the other two grounds of attack for the reason that they were clearly without merit (R. 61-63). The court of appeals entered a *per curiam* order dismissing the petition (R. 65-66). On petitioner's motion for reconsideration or for clarification (R. 66), the court entered a clarifying *per curiam* order dismissing the petition on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (R. 71-72).

ARGUMENT

I

The sole grounds upon which petitioner challenges the validity of the grant of a certificate to Resort are that (1) there was failure to comply with the requirements of the statute in granting such certificate and (2) that Section 801 of the Act constitutes an unconstitutional delegation of congressional power to the President. But petitioner did not raise these issues before the Board although it had opportunity to do so, and they are therefore not open to judicial review. The proceeding for review of the Board's order was brought under Section 1006 of the Act and subdivision (e) of Section 1006 provides (*infra*, p. 16):

> No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

There were not "reasonable grounds" for petitioner's failure to urge its objections before the Board. Not only did the Board's order granting a certificate to Resort (to become effective more than 60 days thereafter) authorize the filing of petitions for reconsideration and not only were such petitions filed by other intervenors (*supra*, p. 5), but the Board's Rules of Practice (14 C. F. R. sec. 285.11) expressly provide that any party may petition for reconsideration of any final order of

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the Board. In the past the Board has, upon reconsideration, reversed with the approval of the President an order which it had previously entered after the order had been approved by the President under Section 801. *Pacific Northwest-Hawaii Service Case,* 9 C. A. B. 414, approved July 29, 1948, Order Serial No. E-2048, approved October 2, 1948.

If petitioner had urged its objections before the Board, that body would have been afforded opportunity to take any appropriate corrective action had it deemed petitioner's contentions meritorious. The purpose of Section 1006(e) is, of course, to afford the administrative agency an "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256. Accordingly, the court of appeals lacked jurisdiction to entertain the only objections to the Board's order which the petitioner relies upon in its petition for a writ of certiorari.[1] See *American Power & Light Company* v. *Securities & Exchange Commission,* 141 F. 2d 606 (C. A. 1), affirmed, 329 U. S. 90. Nor will constitutional questions be considered when they might have been, but were not, raised in the course of orderly administrative process. *Aircraft & Diesel Equipment Corporation* v. *Hirsch,* 331 U. S. 752.

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[1] Petition for writ of certiorari, p. 1.

II

If, contrary to our argument under Point I, petitioner is in a position to urge non-compliance with statutory requirements in the certification of Resort notwithstanding its failure to present this claim to the Board, its application for certiorari must nevertheless be denied because of the lack of merit in this contention. The case, therefore, does not present the question stressed by petitioner as to whether an order not satisfying statutory requirements is reviewable.

Petitioner does not challenge the steps in the administrative proceeding leading up to the decision which the Board originally submitted to the President. Its contention is that although the order of the Board which it is attacking derives vitality only from approval by the President, the statute requires (1) that the Board, and not the President, must designate the carrier to be given a certificate and (2) that the Board must make a finding of the "fitness" of the certificated carrier to perform the transportation service authorized by the certificate issued to it.

The first contention seems wholly without substance. The Board in its order of June 1, 1949, did designate Resort as the carrier to receive a certificate to perform certain foreign air transportation. It is true that the Board so acted at the direction of the President, but this is precisely what is contemplated and authorized by Section

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801 of the Act. As this Court said in the *Waterman* case (p. 109), the President's control of the ultimate decision is not "a mere right of veto," his control "is not limited to a negative but is a positive and detailed control over the Board's decisions." In other words, Section 801 authorizes the President to determine that a particular applicant for a certificate is entitled to receive a certificate of authority to operate.

It is also apparent that the finality of the President's determination that a carrier should receive a certificate authorizing it to engage in certain air transportation is not qualified by the condition that the Board make a finding that the carrier is "fit, willing and able" to perform such transportation. If the power conferred upon the President by Section 801 were thus conditioned, the Board would have the authority to frustrate the President's determination. The absurdity of this result is underlined by the fact that the President may have acted upon independent information not available to the Board or to the public. He may act upon "information properly held secret" (333 U. S. at p. 111). Grant of authority to conduct foreign air transportation involves issues which "should be prudently correlated with facilities and plans for our own national defenses and raise[s] new problems in conduct of foreign relations" (*id.* 108).

Here the President's decision was based on reasons affecting our relations with foreign countries

and in the interest of our national security (R. 41). Since Congress intended to vest in the President power to make decisions based upon broad national interests, it would be wholly inconsistent with this objective to construe the statute as subjecting his power to the qualification that the Board find that the carrier whom the President has found to be fit to perform certain transportation is, in fact, "fit, willing and able." Particularly is there no room for such a limitation when the information available to the Board may be narrower than that on which the President has acted.

III

We have shown under Point II that in the present case there was no departure from statutory requirements. It therefore follows that the *Waterman* case is controlling. That case held that when the President has acted pursuant to the authority given him by Section 801 of the Act and has approved an order of the Board issued at his direction, such order "emanates from the President [and] is not susceptible of review by the Judicial Department" (333 U. S. at p. 112). In the *Waterman* case the President had disapproved certain portions of the decision which the Board had submitted to him and had advised the Board of the changes which he required, and the Board then submitted a revised order and opinion which the President approved. *A fortiori* in the present case, where the entire order adopted by the Board

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and approved by the President emanated from him, the order is not subject to judicial review.

Clearly the court of appeals was right in dismissing the petition for review because "after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion." 333 U. S. at p. 113. In the present case the order of the Board was "finalized by Presidential approval" when the President approved the order on June 9, 1949. Orders so finalized "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." *Id.*, p. 114.

IV

Petitioner contends (Pet. 13) that Section 801 constitutes an unconstitutional delegation of congressional power. We submit that since petitioner did not urge this objection before the Board it is not in a position to make this contention. See *supra,* pp. 6-7. Furthermore, it is questionable whether the contention is presented to this Court by the petition for writ of certiorari. The petition (p. 1) prays for review of the order which the court of appeals entered in this case "in so far as said order dismissed the petition for review and denied judicial review of the contentions advanced by petitioner in Points 4 and 5 of its petition for

review." Points 4 and 5 of said petition (R. 52-53) do not charge that Section 801 constitutes an unconstitutional delegation of congressional power.[2]

In any event, there is no merit to the contention that Section 801 is subject to constitutional infirmity because of absence of statutory standard to serve as a guide to exercise of the authority conferred upon the President by that section. The constitutionality of Section 801 was implicitly sustained in the *Waterman* case (333 U. S. at p. 109). See also *Colonial Airlines, Inc.* v. *Adams,* 87 F. Supp. 242 (D. D. C.), appeal dismissed on motion of appellant, 338 U. S. 947.

Whether or not the standards of "public interest" (see Sections 2, 401(d) of the Act) are applicable to action taken under Section 801, the delegation is clearly valid. As the *Waterman* case declares, the President possesses in the field of foreign air transportation both his own constitutional authority "as Commander-in-Chief and as the Nation's organ for foreign affairs" and the power delegated to him by Congress, and the President's

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[2] The petition for review did not set forth this constitutional question as a ground for reversal of the Board's order (R. 51-53). While petitioner applied to the court below for leave to amend its petition for review so as to set forth this constitutional question as ground for reversal, the court below denied the petition for leave to amend (R. 71-72). Moreover, the petition for leave to amend is not included in the record filed with this Court.

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action under Section 801 "draws vitality from either or both sources." 333 U. S. at pp. 110-111. Where Presidential authority thus arises from a pooling of executive and legislative powers, it is well established that Congress need not set forth standards to guide the action of the Executive. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537. See also *Lichter* v. *United States*, 334 U. S. 742, 785; *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U. S. 90, 104-105. Indeed, Congress failed to prescribe standards limiting the President's discretion because it believed any such restriction would infringe upon the Executive's constitutional prerogatives.[3] To read into the statute a congressional restriction on the power of the President in this critical field might even raise constitutional doubts as to its validity.

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[3] Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong. 3d Sess. (1938) on H. R. 9738, pp. 37, 40; Hearings before the Senate Committee on Commerce, 75th Cong., 3rd Sess. 1938, on S. 3760, p. 6; 83 Cong. Rec. 6726; 83 Cong. Rec. 6853.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below is correct and that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HERBERT A. BERGSON,
Assistant Attorney General.

CHARLES H. WESTON,
RICHARD E. GUGGENHEIM,
Special Assistants to the Attorney General.

JOHN H. WANNER,
Associate General Counsel,
Civil Aeronautics Board.

O. D. OZMENT,
Attorney, Civil Aeronautics Board.

August, 1950.

APPENDIX

Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481) provides in part:

> (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation: * * *.
>
> * * * * *
>
> (d)(1) The [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601) provides in part:

> The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all appli-

cations in respect of such certificates and permits shall be transmitted to the President by the [Board] before hearing thereon, and all decisions thereon by the [Board] shall be submitted to the President before publication thereof. * * *

Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646) provides in part:

(a) Any order, affirmative or negative, issued by the [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(e) The findings of facts by the [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 235

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
RESORT AIRLINES, INC., *Intervener*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF INTERVENER IN OPPOSITION.

L. WELCH POGUE,
JAMES F. BELL,
730 Southern Building,
Washington 5, D. C.,
Attorneys for Intervener.

Of Counsel:
POGUE & NEAL,
730 Southern Building,
Washington 5, D. C.

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BRIEF OF INTERVENER IN OPPOSITION.

OPINIONS BELOW.

The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (R. 71-72) dismissing the Petition for Review of the order of the Civil Aeronautics Board (R. 42-43) has not yet been reported.

JURISDICTION.

The grounds upon which jurisdiction of this Court is invoked are set out in the Petition for Writ of Certiorari at page 2.

QUESTIONS PRESENTED.

1. Whether the holding of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation,* 333 U. S. 103 (1948) precludes judicial review of the order involved in this proceeding, which completely emanated from the President in that it only reflected a directive of the President contrary to the recommendation of the Board.

2. Whether judicial review of a Petition for Review filed with the Court of Appeals for the District of Columbia Circuit on August 8, 1949 is precluded by the fact that it was not filed within sixty days "after the entry of such order" of the Civil Aeronautics Board on June 1, 1949, as specifically required by Section 1006(a) of the Civil Aeronautics Act.

3. Whether judicial review of the objections to such order which Petitioner now raises is precluded by the fact they were not raised before the Civil Aeronautics Board at any time as required by Section 1006(e) of the Civil Aeronautics Act although there was ample time to do so in the form of a Petition for Reconsideration to the Board as authorized by its Rules of Practice.

STATUTE AND RULE INVOLVED.

The pertinent statutory provisions are cited in Appendix A of the Petition for Writ of Certiorari. The pertinent Rules of Practice of the Civil Aeronautics Board are set out in Appendix B, *infra,* page 17.

STATEMENT.

Section 801 of the Civil Aeronautics Act[1] provides that the "issuance" or the "denial" of any certificate authorizing an air carrier to engage in overseas or foreign air transportation "shall be subject to the approval of the President". Pursuant to this Section of the Act the Board submitted a recommendation to the President that both applications in a consolidated proceeding before the Board entitled the "Skycruise" Case, Docket No. 2377, et al., filed by the Intervener, Resort Airlines, Inc. (Resort), and American Air Export and Import Company (AAXICO), be denied. The President approved of the recommendation that AAXICO's application be denied and disapproved the recommendation that Resort's application be denied. Although the Act does not require the President to state his reasons for approval or disapproval of Board action, he returned the Board's recommendation with the advice (as reported without quotation by the Board) that "for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas air transportation substantially in accord with the recommendation of the Examiner" with certain exceptions not here relevant. (R. 41) Acting pursuant to that Presidential directive under Section 801 of the Act, the Board on June 1, 1949, entered its revised order, together with an explanatory opinion, carrying into effect this decision of the President (R. 36-43) and submitted it to the President who approved it on June 9, 1949, by signing it as "Approved". (R. 43) That order, which Petitioner now seeks to have reviewed here, granted a temporary certificate to Resort authorizing it to engage

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[1] The Civil Aeronautics Act will hereafter be referred to as the "Act" and the Civil Aeronautics Board will be termed the "Board".

in foreign and overseas air transportation limited to round-trip, all-expense escorted tours between eight points in the United States and certain intermediate points in foreign countries and United States possessions, subject to certain further limitations. (R. 43-45) The order further provided that the certificate would have a life of five years and was to become effective 60 days after the date of its approval by the President unless such effective date were extended by order of the Board prior to such date either on the Board's own initiative or upon the filing of a petition for reconsideration of the Board's order of June 1, 1949, (R. 45) (Petitions for reconsideration are authorized by the Board's Rules of Practice as set out in Appendix A, *infra.*) Although such petitions were filed by several of the other party intervenors, the Petitioner herein failed to file any petition with the Board for reconsideration of the order complained of herein; and it did not at any time ask the Board to extend the effective date of the certificate or to consider the objection that the President had exceeded his statutory authority—a contention which has never been presented to the Board. On August 4, 1949, the Board by Order (Serial No. E-3117) denied the said petitions for reconsideration and the certificate issued to Resort became effective, according to its terms, on August 8, 1949. On that date the Petition for Review was filed herein. (R. 53)

On May 8, 1950 the Court of Appeals for the District of Columbia Circuit denied Petitioner's Petition for Rehearing and Reconsideration of the *per curiam* order, dated January 18, 1950, dismissing the Petition for Review, and indicated that its action in such dismissal was on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Co.*, 333 U. S. 103 (1948). (R. 71-72) The Court also stated that it had taken judicial notice of the fact that H.R. 5771, 70th Cong., 2d Sess., died in Committee. (R. 71) This bill, set out in full in Appendix B attached hereto, filed March 8, 1948, and referred to the Committee on Interstate and Foreign Commerce, was designed to amend Section

1006(a) of the Act to authorize judicial review of orders of the Board affecting the rights of domestic air carriers to engage in overseas or foreign air transportation.

ARGUMENT.

1. The President's authority to approve an order of the Board granting a certificate for foreign air transportation was exhaustively considered by this Court in the Waterman case. The Court of Appeals for the District of Columbia Circuit was clearly correct in holding that the Waterman case precludes judicial review of the order of the Board approved by the President, carrying into effect a decision made by him, involved in this proceeding.

Petitioner presented to the Court below for review an order of the Board which is not only squarely within the holding of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Co.*, 333 U. S. 103 (1948), but represents an even stronger factual situation than was presented there. The *Waterman* case held that an order of the Board subsequently approved by the President was non-reviewable since "whatever of the order emanates from the President is not susceptible to review by the Judicial Department." *Idem*, 112. The order in that case coincided with a recommendation of the Board that Chicago & Southern Air Lines be certified for a route in the Latin American Area. In the present case, however, the President disapproved of the recommendation of the Board that the application of Resort be denied and directed that a certificate be issued to it. The order which Petitioner complains of herein, therefore, *completely* "emanates from the President" since it reflects purely and simply the directive of the President, which was contrary to the recommendation of the Board, and is unquestionably within the scope of the *Waterman* case holding such orders to be non-reviewable by the Judicial Department.

Petitioner seeks the issuance of a writ of certiorari from this Court on the grounds that the factual situation in the *Waterman* case is distinguishable from the instant case because its contention that the President has exceeded his statutory authority under Section 801 of the Act by (1) specifying the particular carrier to render the air transportation which he considered to be in the national interest, and (2) designating such carrier without the benefit of a finding by the Board as to its "fitness, willingness, and ability," is an irregularity within the meaning of the introductory phrase of the *Waterman* case opinion, which speaks of "proceedings not challenged as to regularity." *Idem*, 105. The question before this Court at this time, therefore, is whether the court below was correct in applying the *Waterman* case in view of this contention of Petitioner. This demands a consideration of whether this allegedly new element injected by Petitioner takes this case out of the "broad sweep of the doctrine laid down in the *Waterman* case"[1] and the comprehensive study of the principles which this Court applied therein.

Certainly so much of Petitioner's objection that the President acted without a finding of "fitness" is squarely within

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[1] The Court of Appeals for the Second Circuit categorized the *Waterman* decision in this manner in holding that under the *Waterman* case it was without jurisdiction to review an order of the Board subsequently approved by the President. *Trans-World Airlines* v. *The Civil Aeronautics Board, et al.*, Civil Action No. —— and *Brian O. Sparks, et al.* v. *The Civil Aeronautics Board*, Civil Action No. 21728, decided August 14, 1950. The order of the Board in this Second Circuit decision, like the instant case, reflected a directive of the President contrary to the recommendation of the Board in which he advised that (1) the transfer to Pan American World Airways, Inc., of American Overseas Airlines' temporary certificate of public convenience and necessity, and the acquisition by the former of the property, assets, and business of the latter should be approved, and (2) the certificates of Pan American and TWA should be amended to authorize Pan American to serve Paris and Rome and TWA to serve London and Frankfurt.

the factual situation involved in the *Waterman* case itself. One of the contentions raised on review there was that the Board had submitted a legally defective finding to the President of the fitness of the carrier which it recommended to the President for certification since the finding was not supported by substantial evidence. *Idem*, 117. This contention may or may not have been true for this Court never considered it on the merits and dismissed the charge with the holding that it did not have jurisdiction to consider the Petition for Review. If this Court in the *Waterman* case decided that it did not have jurisdiction to review what might have been an inadequate, indeed, a possibly mistaken recommendation wrongly influencing the President's determination, it is impossible to see how Petitioner can now argue that jurisdiction exists to consider the question of whether the lack of any recommendation at all on this point constituted defective procedure.

Of even more importance, however, is that fact that both of Petitioner's objections are fully within the scope of the two principles which the Supreme Court applied in the *Waterman* case in considering the reviewability by the Judicial Department of an order of the Board approved by the President. This Court there determined that such orders "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate," *Idem*, 114, and that to review such orders would be to render "an advisory opinion in its most obnoxious form." *Idem*, 113. The exhaustive treatment given these matters in the opinion should set at rest any contention that a factual variation such as Petitioner alleges in this case destroys the applicability of the *Waterman* doctrine.

In the *Waterman* case this Court first analyzed the nature of foreign air transportation and recognized that "aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defense and raise new problems in conduct of foreign relations." *Idem*, 108. It concluded, therefore, that pursuant to this recogni-

tion Congress had provided for Presidential control which "is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies," *Idem*, 109, and was a type of control which has "long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Idem*, 111.

In the present case the Board, in its explanatory opinion accompanying its order of June 1, 1949, states that after it submitted to the President its decision in which it decided the application of Resort should be denied, the President "advised the Board that for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc., be granted temporary authority . . ." (R. 41). The Board reflected this directive of the President in an order subsequently approved by the President. This order granting a certificate to Resort, over which Petitioner now seeks judicial review, is, therefore, *based solely upon the President's judgment in the exercise of his political power* and fully falls within the recognition by this Court in the *Waterman* case that the "Judiciary has neither aptitude, facilities nor responsibility" to handle such questions. *Idem*, 111.

This Court also applied the principle in the *Waterman* case that the Judicial Department will not exercise jurisdiction over matters where they cannot with finality decide the issues present. On page 113 of its opinion this Court said: "To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control."

Assume that judicial review is taken in this case and Petitioner's contentions expressed in its Petition for Review are sustained. The court below would remand the matter to

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the Board for further proceedings in accordance with its opinion, but anything which the Board did pursuant thereto would be subject to later Presidential approval, which this Court in the *Waterman* case described as a "positive and detailed" control of the Board's action. The President, therefore, has the ultimate discretion to disregard any decision of the court. Such a situation clearly falls within the scope of the *Waterman* case, where this Court forcefully pointed out, at page 113, of the opinion that "Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government" and "if the President may completely disregard the judgment of the court, it would only be because it is one the courts were not authorized to render."

It is submitted, therefore, that the court below was completely correct in its interpretation of the *Waterman* case to cover the instant case. The contentions which Petitioner now raises do not present a distinguishing factual situation raising any important new issues which have not already been fully covered by the extensive treatment of this entire question in the *Waterman* case.

2. There is no conflict between the Court of Appeals for the District of Columbia Circuit granting the motion to dismiss the Petition for Review and a recent decision of the United States District Court for the District of Columbia sitting as a three-judge court in the case of Colonial Airlines v. Adams, et al., 87 Fed. Supp. 242 (1949).

Petitioner argues that the *Colonial* case and the action of the court below are inconsistent.[1] (Pet. 13, 14.) There is

[1] The only Circuit Judge sitting in the *Colonial* case was Judge Proctor, 87 Fed. Supp. 242, who also joined in granting the motion to dismiss in this case (R. 71). In his opinion, at least, there is no conflict between the two decisions.

no conflict between the substantive holdings of the two decisions but Petitioner asserts that the "assumption" behind the *Colonial* decision conflicts with the holding of the court below and, therefore, a conflict exists which warrants the grant of a writ of certiorari. Intervener submits that the two cases are completely distinguishable and cannot possibly be considered inconsistent on their facts.

First of all, the *Colonial* case did not concern itself with the question involved in the instant case of whether a court has jurisdiction of an order of the Board *after* it had been approved by the President pursuant to Section 801 of the Act. The *Colonial* court took jurisdiction *prior* to Presidential action. After observing that it might seem that the Plaintiff should not be heard because no competitive permit had been issued, the *Colonial* court said at page 243: "However, as there is no statutory judicial review whatever provided with respect to the administrative action here involved," (the issuance of a foreign air carrier permit), "the Court is of the view that the constitutional question presented should now and here be met and answered."

Secondly, it is by no means clear that the "assumption" to which Petitioner refers in the *Colonial* case is inconsistent with the decision of the court below. All that the *Colonial* case assumed was that when the Board makes recommendations to the President, it must make the findings required by Section 402(b) that the applicant is fit and the issuance of the permit is in the public interest. Thus if the Board recommends the *issuance* of a permit it must make these findings according to Section 402. But the *Colonial* case did not say that if the Board recommends the *denial* of a permit on the grounds that it is not required by the public interest, it must go through the academic procedure of passing on the fitness of the applicants. This is the situation which is involved in the instant case and is a matter which the *Colonial* case did not consider at all.

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3. Judicial review of the Board's order is precluded by the provisions of Section 1006(a) of the Civil Aeronautics Act in that it was not sought until after the expiration of the appeal period of sixty days from the entry of the order by the Board.

Section 1006(a) of the Act which is set out in full on pages 23 and 24 of the Petition for Writ of Certiorari reads in part:

> "Any order . . . issued by the (Board) under this Act shall be subject to review upon petition filed within sixty days after the entry of such order. . . . After expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

The President approved the order of the Board entered on June 1, 1949 (R. 42) eight days later on June 9, 1949 (R. 43). Until this date the order could not be published in accordance with Section 801 of the Act. However, this still left fifty-two days until the expiration of the sixty day appeal period running from the entry of the order by the Board during which time a Petition for Review could have been but was not sought. Nor did Petitioner file a Petition for Reconsideration with the Board of its order which would have tolled this appeal period until the Board acted thereon. *Braniff Airways* v. *Civil Aeronautics Board*, 147 F. 2d 152 (C. C. A. D. C. 1945). Sixty days from the entry of the Board's order expired on August 1, 1949 and the Petition was not filed until August 8, 1949 (R. 53). Petitioner's delay in filing has therefore deprived the court below of jurisdiction to hear the Petition for Review because it was not filed within the statutory period and no "leave of court" upon a showing of "reasonable grounds" was obtained to permit a late filing.

Petitioner has sought to avoid the results of its tardy Petition for Review by arguing that "since the Board is prohibited under Section 801 of the Act from publishing

its final order until Presidential approval has been obtained, the sixty day appeal period cannot begin to run until Presidential approval has attached" (Pet. 5). It is true, of course, that some time delay will result between the time of the entry of an order by the Board concerning foreign air transportation and the required Presidential approval. Whether or not it would have been desirable for Congress to have extended the appeal period under these circumstances is not the question, however, for Congress has the power to "formulate the conditions under which resort to the courts may be had" to review an administrative proceeding, *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, 389 (1946), and in other administrative legislation has made it perfectly clear that it is capable of precisely stating the dates from which an appeal period commences to run and for what length of time. Nor is it necessary to read the plain statutory language of Section 1006(a) setting an appeal period running from the "entry of such order" of the Board in any other way in order to keep within the general policy of the Act. If a delay between the entry of the Board's order and Presidential approval is substantial, it would surely be grounds for asking and receiving "leave of court" to permit a late filing under Section 1006(a)—an opportunity which Petitioner had to extend the fifty-two days which it already had but did not utilize prior to filing its Petition for Review.

4. Judicial review of the contentions which Petitioner now raises is precluded by the fact that they were never raised before the Board at any time as specifically required by Section 1006(e) of the Civil Aeronautics Act.

Section 1006(e) of the Act which is set out in full on page 24 of the Petition for Writ of Certiorari provides in part:

> "No objection to an order of the (Board) shall be considered by the Court unless such objection shall have

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> been urged before the (Board) or, of it was not so urged, unless there were reasonable grounds for failure to do so."

This Court has declared that compliance with a provision of this type in statutes dealing with judicial review of administrative action is a prerequisite to judicial review. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256 (1943).

Petitioner is now seeking review of the order of the Board on the grounds that the President exceeded his statutory authority under Section 801 of the Act in two respects. Although these contentions could not have been made prior to the issuance of the final order of the Board which represented final action of both the President and the Board, Petitioner had ample opportunity thereafter to do so in the form of a Petition for Reconsideration of the order as specifically provided for in the Board's regulations.[1] Petitioner did not file any Petition for Reconsideration and is, therefore, presenting these contentions to the court below for the first time in patent contravention of the provisions of Section 1006(e) cited above.

It is no excuse for failure to comply with Section 1006(e) to argue that such action might have been futile, as Petitioner has apparently done when it states that the only recourse after Board and Presidential action was "to seek judicial review" (Pet. 5). It has been clearly established that rigorous compliance with provisions such as Section 1006(e) must be made prior to judicial review even though the alleged defects in the administrative order involve, as do Petitioner's two contentions, a breach of statutory au-

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[1] The Board's "Rules of Practice" authorizing Petitions for Reconsideration are set out in full in "Appendix A."

thority[1] or unconstitutional action.[2] Provisions such as Section 1006(e) are *requirements imposed by Congress* which the courts cannot alter. *Todd* v. *Securities & Exchange Commission*, 137 F. 2d 475, 478 (C. C. A. 6th 1943).

Of even more importance, however, is the fact that if Petitioner's alleged deficiencies in the Board's order had been brought to its attention, action might very well have been instituted by the Board resulting in the issuance, with the President's approval, of a revised order correcting the alleged irregularities. This judicial proceeding might thereby have been rendered completely unnecessary. Since Petitioner has not given the Board an opportunity to supply the alleged deficiencies to its order without a valid reason for failure to do so, it has not complied with the prerequisite for judicial review contained in Section 1006(e).

CONCLUSION.

Petitioner has urged this Court to grant a writ of certiorari on the grounds that the issues raised in this proceeding are of far-reaching importance requiring judicial determination. The Intervener submits that this argument might have been used by the Petitioner when it sought a writ of certiorari from this Court in the *Waterman* case, but that these issues have now been put at rest by the comprehensive treatment which they received in that case. The court below was therefore perfectly correct in dismissing the Petition for Review on the basis of the *Waterman* case. The contentions which Petitioner now raises do not create any distinguishing feature which bring this case out of the broad sweep of the doctrine laid down in the *Waterman*

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[1] e.g. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253 (1943); *Phillips* v. *Securities and Exchange Commission*, 156 F. 2d 606 (C. C. A. 2nd 1946).

[2] e.g. *Pacific Gas & Electric Co.* v. *Securities and Exchange Commission*, 127 F. 2d 378 (C. C. A. 9th 1942), affirmed 324 U. S. 826 (1944), rehearing denied 324 U. S. 890 (1944); *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475 (C. C. A. 6th 1943).

case. Certainly, if this Court declared in the *Waterman* case that the Judicial Department did not have jurisdiction to review an order of the Board approved by the President in which the President agreed with the Board's recommendations, on the grounds that to do so would be to interfere with the political authority of the President and to render an obnoxious advisory opinion, *a fortiori* no jurisdiction exists here where the order for which review is sought only reflects a directive of the President contrary to the recommendations of the Board.

Petitioner also labors under two jurisdictional defects which should cause this Court to deny its application for a writ in that it has failed to comply with procedural requisites for judicial review as specifically set forth in Section 1006 of the Act. It filed its Petition for Review on August 8, 1949 with the court below which was not within sixty days of the entry of the Board's Order on June 1, 1949 as required by Section 1006(a) of the Act. In addition, it did not present to the Board at any time its contentions that the President exceeded his statutory authority although it could have done so by filing a Petition for Reconsideration and, perhaps, have avoided this entire judicial proceeding. It is barred from raising these issues on appeal, therefore, by the provisions of Section 1006(e) of the Act.

WHEREFORE, Intervenor, Resort Airlines, Inc., prays that this Honorable Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the Petitioner, Chicago & Southern Air Lines, Inc.

Respectfully submitted,

L. WELCH POGUE,
JAMES F. BELL,
730 Southern Building,
Washington 5, D. C.,
Attorneys for Intervener.

Of Counsel:
POGUE & NEAL,
730 Southern Building,
Washington 5, D. C.
Dated: September 6, 1950

APPENDIX A.

Section 285.11 of the Civil Aeronautics Board's Rules of Practice in Economic Proceedings, 14 C.F.R. 285.11 [1]

Petition for rehearing, reargument, or reconsideration—

(a) ***Parties.*** **Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.**

(b) ***Contents of petitions.*** **(1) The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition.**

(2) If a final order of the Board is sought to be vacated or modified by reason of matters which have arisen since the hearing, or of a consequence which would result from a compliance therewith, or both, the new matter, the resulting consequence, or both, which are relied upon by the petitioner must each be set forth in the petition. Where the petition is based wholly or in part upon new matter, the petition must contain a statement that the petitioner, with due diligence, could not have known or discovered the new matter prior to the time of the hearing.

(3) The petition must set forth a brief statement of the relief sought by the petitioner and conform to requirements of § 285.3.

(c) ***Filing and service of petitions.*** **Such petition for rehearing, reargument, or reconsideration, must be filed within thirty days after service of the order sought to be vacated or modified. After the expiration of said thirty days, such a petition may be filed only by leave of the Board granted pursuant to formal application upon a showing of reasonable grounds for failure to file the petition within the prescribed thirty-day period. Any such petition or application shall be served by the petitioner or applicant upon all parties to the proceeding or their attorneys of record.**

(d) ***Stay of orders.*** **No petition for rehearing, reargument, or reconsideration filed in accordance with this section, or the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Board.**

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[1] On June 23, 1949 this Section was redesignated as Section 302.11 effective July 1, 1949.

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APPENDIX B.

80th Congress H.R. 5771 2d Session

IN THE HOUSE OF REPRESENTATIVES

March 9, 1948

Mr. Bartlett introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce.

A BILL

To amend the Civil Aeronautics Act of 1938, as amended, to provide for judicial review of orders of the Civil Aeronautics Board affecting the rights of domestic air carriers to engage in overseas or foreign air transportation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 1006 of the Civil Aeronautics Act of 1938, as amended (June 23, 1938, 52 Stat. 1024), is hereby amended to read as follows:

"(a) Any order, affirmative or negative, including but not limited to any order in respect of any domestic air carrier subject to the approval of the President as provided in section 801 of this Chapter, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this chapter, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Sec. 2. That this amendment will remove ambiguity from the language employed in section 1006 of the Civil Aeronautics Act of 1938; and, in all applicable cases before them, the Federal courts shall construe the language of this amendment as if it were an original part, and set in the context of the Civil Aeronautics Act of 1938.